BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: THOMPSON PACIFIC CONSTRUCTION, INC. 1235 Mendocino Avenue Santa Rosa, CA 95401 Employer	Docket Nos. 00-R1D5-2593 and 2594 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above entitled matter by Thompson Pacific Construction, Inc. (Employer) under submission, makes the following decision after reconsideration.

JURISDICTION

On July 10, 2000, a representative of the Division of Occupational Safety and Health (the Division) conducted a complaint inspection at a place of employment maintained by Employer at 1235 Mendocino Avenue, Santa Rosa, California (the site).

On July 11, 2000, the Division issued two citations to Employer, one alleging a serious violation of section 3385(a) [jack-hammer concrete without adequate foot protection]; and the other alleging a general violation of section 1541.1(a) [employees in excavation without cave-in protection] and a regulatory violation of section 341(a)(1) [no excavation permit for a 5′ 3″ deep elevator base] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.[1] The Division proposed civil penalties of $4,387, $487 and $812, respectively, for the violations.

Employer filed a timely appeal contesting the existence of the alleged violations and the reasonableness of the proposed penalties.

[1] Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.

On February 5, 2003, a hearing was held before Manuel M. Melgoza, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, in Santa Rosa, California. Quinlan S. Tom, Attorney, represented Employer. Amy Martin, Staff Counsel, represented the Division.

On February 13, 2003, the ALJ issued a decision denying Employer's appeal.

On March 20, 2003, Employer filed a petition for reconsideration. The Division filed an answer on April 11, 2003. The Board took Employer's petition under submission on May 9, 2003.

Docket No. 00-R1D5-2594
Section 3385(a)
Serious

EVIDENCE

Employer was remodeling a high school on the inspection date. One of the tasks was to install an elevator, and some of Employer's employees were working in a basement at the site when Jimmie Jones (Jones), Associate Safety Engineer for the Division, inspected the site. One of the employees was shoveling dirt out of the basement and removing it from the building.

Jones testified that while he was examining and measuring the excavation, which was to be the elevator's base, another worker was using a jack-hammer to break through a portion of the basement's concrete slab. After Jones finished examining the excavation, he turned his attention to the worker, Lee Turner (Turner), who was doing the jack-hammering. Jones, accompanied by project superintendent Tony Franceschini, noticed that Turner was wearing standard work boots (not steel-toed). He also noticed that the jack-hammer was air-operated, had a pointed metal tip, and estimated that it weighed 90 pounds.

Jones asked if Turner had steel-toed shoes. Turner responded (still in Franceschini's presence) that steel-toed shoes were dangerous and he would not wear them. Jones asked Franceschini if they had metatarsal covers – a sandal-type device that fits over work boots and has a steel cover over the entire metatarsal portion of each foot. Franceschini said they did not have any on the job site. Jones asked why they could not get them. Franceschini replied that he could not make the employees wear them nor could he make employees comply with safety. Turner said he would not wear steel-toed shoes or metatarsal protectors because he felt they were dangerous. Franceschini did not chastise or admonish Turner in any way. Rather, when Jones indicated that it appeared that he would cite Employer for violative conditions, Franceschini became visibly angry and loudly said Jones should issue the

citations directly against the employees. Jones said the Division had no means to cite the employees directly.

Employer questioned Jones over whether Turner was really operating a "chipping gun" rather than a jack-hammer. Jones conceded that he did not photograph the jack-hammer, did not weigh it and did not operate it. However, he has experience and training using jack-hammers of different sizes, as well as chipping guns. Chipping guns, although they operate in a similar fashion, are usually lighter in weight, and allow the operator to hold them horizontally and at angles. The device Turner was using was much larger than the chipping guns Jones has observed, and Turner was holding it exactly as one would use a jack-hammer, vertically between his feet. Although many years have passed since Jones actually used jack-hammers, air-operated types have not changed in the intervening years, based on Jones' investigative experience. This jack-hammer was an air-operated type and appeared to be a 90-pound model, one of the types Jones has experience operating. Although he did not see Turner actually break all the way through the 6-inch layer of concrete, he noticed its rapid action and pointed bit.

Based on Jones' experience and training, steel metatarsal covers are appropriate and are standard equipment for this type of jack-hammering work. Steel-toed shoes are the next best protection method, but they do not fully cover all areas of the foot that might be impacted. Jones observed Turner's activity and determined that the rapidly-moving device could bounce up and come down on Turner's foot. Based on his training (both Division-provided and his own previous apprenticeship training as a journeyman sheet metal worker), injuries to the foot include crushing and amputations.

Jones maintained that Turner's device was a jack-hammer, not a chipping gun. Also, a jack-hammer of this size has the capacity to penetrate concrete, and could penetrate fiberglass reinforced boots. Therefore, steel metatarsals were the appropriate foot protection, but at least steel-toed boots should have been used.

Employer did not call Lee Turner to testify and called no witnesses.

ISSUES

1. Did the Division establish a violation of section 3385(a)?
2. Did Employer establish good cause for amending its appeal to include contesting the serious classification of the violation?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

1. The Division Established a Violation of Section 3385(a)

Section 3385(a) provides:

> Appropriate foot protection shall be required for employees who are exposed to foot injuries from electrical hazards, hot, corrosive, poisonous substances, falling objects, crushing or penetrating actions, which may cause injuries or who are required to work in abnormally wet locations.

Employer contends that the ALJ's findings that a Thompson-Pacific employee used a jack-hammer or, alternatively, that he did not use foot protection appropriate for the task, were not supported by the evidence.

Employer argues that because the Division investigator did not photograph, weigh, or operate the tool that Turner used, the investigating officer's conclusion that the tool was a jack-hammer as opposed to a chipping gun cannot be upheld.

The Board disagrees, these are the same arguments persuasively addressed by the ALJ in the decision. During the inspection, Jones came across an employee using what Jones identified as a 90-pound, air-operated jack-hammer with a metal tip. When asked, Franceschini identified the individual operating the jack-hammer as Turner, an employee of Employer.

Jones testified that he is familiar with jack-hammers based on his 27 years of experience in the construction industry as well as his experience as a California Occupational Safety and Health Inspector. The unit being operated by Turner was larger and heavier than a chipper gun and being used in a manner consistent with that of a jack-hammer (vertically between the feet.) Jones further testified that he was familiar with chipper guns and knew that the machinery operated by Turner was not a lighter, smaller chipper gun that he was familiar with, but rather a heavier, larger jack-hammer which he was also familiar with. We believe this evidence was sufficient to establish that Employer's employee was using a jackhammer which exposed his feet to crushing or penetrating injuries within the meaning of section 3385(a), and thus, triggered the requirement for appropriate foot protection under the circumstances.

The Board agrees with the ALJ that the Division satisfied its burden of proof that Employer's employee did not wear appropriate foot protection. Jones testified that he observed Turner to be wearing ordinary work shoes as opposed to work shoes with any form of additional protection. This observation was confirmed by Turner, in his supervisor's presence, who asserted that he would not wear steel-toed shoes because they were dangerous. Jones asked Franceschini if there were any metatarsal covers on the premises for use by employees. Franceschini responded that there were none because he could not

make the employees wear them or comply with any other safety rules.[2] Jones' un-refuted observation of Turner wearing ordinary work shoes combined with the admissions of both Turner and Franceschini are sufficient to demonstrate that section 3385(a) was violated.

2. Employer Failed to Establish Good Cause for Amending Its Appeal to Contest the Classification of the Violation

Employer did not raise the violation's classification or proposed penalty as issues in its appeal form, did not move to amend it at the beginning of the hearing when the hearing's scope was discussed, and failed to show good cause when it moved to amend the appeal at the end of the hearing after the Division rested its case. Accordingly, the ALJ found that those issues were waived. [See § 361.3; *Western Paper Box Company*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986); *California Erectors, Bay Area, Inc.*, Cal/OSHA App. 93-503, Decision After Reconsideration (July 31, 1998); and *Helical Products Company, Inc.*, Cal/OSHA App. 99-2284, Denial of Petition for Reconsideration (Aug. 25, 2000).]

At the hearing's close, Employer moved, over objection, to amend its appeal to include the classification of the alleged violation of section 3385(a) (Citation 2). The motion was denied because the ALJ determined that Employer failed to demonstrate good cause for the untimely motion under sections 371.2 and 371(d), and because the Division demonstrated that it would be prejudiced by the amendment if it were granted.

Employer blames its failure to appeal the classification on the fact that the original citations were appealed by Franceschini as opposed to some other management employee. Employer contends that the appeal forms were filed by Franceschini and that the forms were then returned to him at his home. Employer then contended that its attorney had never seen the actual appeal forms and should, therefore, be allowed to amend its appeal at this late date.

The appeal forms were sent to the Employer's home office. As noted by Counsel for the Division and the ALJ, the file in this matter reveals that Trevor Thomas (Thomas), a Project Engineer for Employer, phoned the Board requesting appeal forms. On July 25, 2000, this call was responded to in writing by Board staff who confirmed by letter that the call had been received and that the appeal forms where enclosed therein. The completed appeal forms were returned by Franceschini on behalf of Employer approximately two weeks later. Employer agrees that the address of the Board's confirming letter was Employer's home office. As noted by the ALJ, this chronology of documents indicates that the Employer was aware of the appeal and that Franceschini filed it on Employer's behalf.

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[2] Jones also testified without contradiction that fiberglass-toed shoes would not have provided adequate protection. Neither Franceschini nor Turner stated to Jones during the inspection that any other form of protection, such as a fiber-glass toed shoe, was being worn or used.

Employer's counsel repeatedly claimed that he had not known that the classification had not been appealed because he did not have a copy of the appeal form. This contention is insufficient to constitute good cause to amend the appeal to contest the classification of the violation. As noted by the ALJ at hearing, Employer's internal filing and communication is its own concern and not a proper ground for a claim of good cause.

The representation that Franceschini had not given a copy of the filed appeal form to Employer's counsel in no way explains or excuses counsel failure to procure the document from some other source. Employer's counsel acknowledged that he had been retained on this matter in February of 2000. He further acknowledged that he was aware of the service on Franceschini as well as Franceschini's filing of the appeal form. Counsel offered no explanation for his failure to request the appeal form from either the Board or from the Division. He specifically acknowledged that he had failed to "check [his] file" and had not "exercised due diligence." The Board sees nothing in this record that causes it to believe that good cause for an amendment after the presentation of evidence exists.

Docket No. 00-R1D5-2593
Item 2, Section 1541.1(a)
General
Item 1, Section 341(a)
Regulatory

EVIDENCE

The Division cited Employer for not obtaining a Division permit to excavate over 5 feet deep where employees are required to enter (Item 2) and for not providing a cave-in protective system for those employees (Item 1). Employer contests the excavation's depth (although not Jones' measurements), and challenges Jones' determination that employees entered the excavation.

While Jones and Franceschini toured the site, Jones saw an excavation that he measured at 12 feet wide by 12 feet long and 5 feet 3 inches deep which included 6 inches of concrete. When he measured the depth and stated the results Franceschini did not dispute the figure. Franceschini told Jones that the excavation was for the purpose of installing a handicap elevator, and the excavation was for the elevator's base. Jones observed that someone had saw-cut the 6-inch thick concrete basement floor, then dug the soil underneath it. He asked Franceschini who had dug the excavation, and Franceschini pointed to the two laborers and said, "my two laborers there," who were identified as Lee Turner and Jorge Cruz. Franceschini told Jones that the employees had to dig it by hand because the space limitations and the confines of the basement made it impossible to get an excavator or a backhoe down

there. Jones also observed a ladder in the excavation, leaning against one of its walls, which he photographed (Exhibits 4 and 5).

Upon noticing that the excavation's walls were vertical and there was no form of cave-in protection, Jones asked Franceschini whether they had used shoring. Franceschini said they had not used shoring. Jones asked him if they had an alternate plan for cave-in protection, and Franceschini said they did not. Jones asked him if they had obtained a Cal/OSHA permit to excavate 5 feet or deeper, and Franceschini said he did not have one. Jones confirmed the lack of a permit upon conducting a records search the following day.

Jones conceded that he did not actually see any employees in the excavation during the inspection. However, he determined they had entered the excavation because of the statements that Franceschini made. The determination was consistent with the presence of the ladder in the excavation, and Jones' experience (which includes hand-digging excavations of this type) that indicates that there is no way to hand dig an excavation of this type without entering it. Jones also acknowledged that if he deducted the 6 inch layer of concrete from the depth measurement, the excavation would be less than the five-foot threshold that triggers the duty to obtain a permit from the Division prior to initiation of work.

ISSUE

Did the Division establish violations of sections 1541.1(a) and 341(a)?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

The Evidence Establishes Violations of Sections 1541.1(a) and 341(a)

Section 1541.1(a) provides:

(a) Protection of employees in excavations.
  (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with Section 1541.1(b) or (c) except when:
    (A) Excavations are made entirely in stable rock; or
    (B) Excavations are less than 5 feet in depth and examination of the ground by a competent person provides no indication of a potential cave-in.
  (2) Protective systems shall have the capacity to resist without failure al loads that are intended or could reasonably be expected to be applied or transmitted to the system. …

Employer contends that the evidence does not support the ALJ's finding that employees of Thompson Pacific Construction, Inc. entered an excavation that was more than five feet deep. Employer primarily bases this contention on its assertion that the excavation was five feet three inches deep only if the measurement includes the top six inches of concrete. Employer contends that concrete is more stable than asphalt and, because the concrete lacked signs of collapse, then the six inch layer should be excluded from the overall trench depth measurement.

To determine an excavation's depth, the Appeals Board has held that "depth is measured from the bottom of the excavation to the surface level." (*A.A. Portanova & Sons, Inc.,* Cal/OSHA App 83-891, Decision After Reconsideration (Mar. 19, 1986) p.4.) In *Dalton Construction Company, A Corporation*, Cal/OSHA App. 83-717, Decision After Reconsideration (Feb. 21, 1986), the Board upheld a violation involving a 6-foot deep excavation, despite Employer's evidence that a top asphalt layer (15 inches) and some base rock brought the excavation's soil portion to less than 5 feet. [3]

Applying the foregoing to the record in this case, Jones' unrefuted testimony shows the excavation was more than five feet deep from the bottom of the excavation to the surface level. In addition, the five-foot depth measurement is a threshold that triggers the requirement to obtain a permit.

Section 341(a) provides:

> (a) Employments which by their Nature Involve Substantial Risk of Injury: The Division shall require any employer who provides employment or a place of employment which by its nature involves a substantial risk of injury to obtain a permit prior to the initiation of any work, practice, method, operation or process of employment. Such employment or places of employment shall be limited to:
>
> (1) Construction of trenches or excavations which are 5 feet or deeper and into which a person is required to descend.
>
> ....

The purpose of the permit requirement is so that the Division can then evaluate the proposed excavation for safety. (See, e.g., *J.G.K. Construction, Inc.*, Cal/OSHA App. 76-389, Decision After Reconsideration (Aug. 23, 1976); and *Fluor Daniel, Inc.*, Cal/OSHA App. 90-948, Decision After Reconsideration (Nov. 20, 1991).) It appears to us that if the soil underneath the six inches of

[3] We agree with the ALJ that Employer essentially requests that the Board assume that a 6 inch layer of concrete at the top of the excavation provides greater cave-in protection than a 15 inch layer of asphalt as existed in *Dalton Construction Company, supra*. This factual contention is not a matter subject to official notice (§ 376.3) without some evidence establishing an evidentiary foundation for accepting such matter as a fact. Employer simply argues its contention, but did not call any witnesses to testify on the subject, and its cross-examination of Jones does not establish the appropriate foundation.

concrete is unstable, then the added weight of the concrete may, indeed, create a hazard for a cave in.

In any event, section 341(b) lists six exceptions to the permit requirements, none of which include top layers that appear to be stable.

The Board believes that the Division's evidence is sufficient to establish that employees entered the excavation. Although Jones did not see anyone in the excavation, the record shows that Employer's superintendent admitted that his two laborers dug the excavation by hand. Jones' experience-based opinion – that digging an excavation of these dimensions by hand requires one to enter – was not refuted. The presence of a ladder in the excavation supports his determination that employees did enter the excavation. Employer failed to call as witnesses either of the workers who hand-dug the excavation, warranting the inference that, if Employer had called them to testify, their testimonies would have been adverse to Employer's argument. (*Rudolph & Sletten, Inc.*, Cal/OSHA App. 85-419, Denial of Petition for Reconsideration (Dec. 24, 1985).)

Based on the above, the Board finds that the evidence established violations of sections 1541.1(a) and 341(a).

DECISION AFTER RECONSIDERATION

Docket No. 00-R1D5-2594

The Board affirms the ALJ's Decision finding a serious violation of section 3385(a) and assessing a civil penalty of $4,387.

Docket No. 00-R1D5-2593
Item 2

The Board affirms the ALJ's Decision finding a general violation of section 1541.1(a) and assessing a civil penalty of $487.

Item 1

The Board affirms the ALJ's Decision finding a regulatory violation of section 341(a)(1) and assessing a civil penalty of $812.

MARCY V. SAUNDERS, Member
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: July 2, 2004